

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of)	
)	DOCKET NO. 17823
[Redacted])	
)	DECISION
Taxpayer.)	
)	

On December 5, 2003, the Sales, Use and Miscellaneous Tax Audit Bureau (Bureau) of the Idaho State Tax Commission (Commission) issued a Notice of Deficiency Determination to [Redacted] The Notice proposed additional use tax, penalty, and interest in the total amount of \$86,362 for the period July 1, 1996, through November 30, 2002. The taxpayer's representative filed a timely appeal and petition for redetermination on December 22, 2003.

The Commission held an informal hearing with the taxpayer and its representative on July 8, 2004. On September 7, 2004, the Commission wrote to the taxpayer and its representative informing them it intended to uphold the tax, penalty, and interest. The Commission received a response dated October 1, 2004, requesting a written decision. The Commission hereby renders its decision upholding the liability.

DISCUSSION OF FACTS

The taxpayer is an [Redacted]-based masonry contractor specializing in commercial building construction. During the audit period, it performed contract work throughout the Pacific and Intermountain Northwest. The taxpayer did not have an [Redacted] use tax number during the period under audit. At issue are the non-taxed purchases of construction scaffolding, other equipment, and supplies that the taxpayer stores in [Redacted] between uses at out-of-state construction sites. The taxpayer returns the scaffolding and other equipment to its [Redacted] headquarters periodically for maintenance, storage and repairs. There is insufficient documentary evidence to conclude that the property has never been used at [Redacted]-based construction sites.

In its protest letter, the taxpayer's representative states:

As a matter of law, simply because equipment is delivered in the state of [Redacted] it does not mean that an Idaho Sales or Use Tax is due. It is only a presumption that tangible personal property brought into the state of [Redacted] is purchased for storage, use or consumption in this state. *See* Idaho Code § 63-3621(h).

The Idaho State Tax Commission has not presented any evidence that the equipment brought into the state of [Redacted] by [Redacted] was for storage, use or consumption in the state of [Redacted].

The auditor documented that the taxpayer depreciates the assets in question on its [Redacted] state tax returns. He also states that the taxpayer has no readily available records that show the movement of the scaffolding and other equipment among construction sites and periodic trips back to [Redacted]. He did not find separate accounting, inventory or storage records for the scaffolding and equipment that would segregate items for a specific job destination to the exclusion of others.

During the informal hearing, an employee of the taxpayer said that all scaffolding is purchased with a beforehand knowledge of where the scaffolding will first be used. She stated that untaxed scaffolding was not "used" in [Redacted] although it came back to [Redacted] periodically. As to whether scaffolding was identified with inventory numbers or the equivalent for tracking purposes, she replied that there are no inventory numbers. She said that she could link freight bills of lading numbers to provide a complete tracking history and estimated that a full work week would be required to determine where everything was at any given time.

Asked whether scaffolding that was untaxed on purchase and was previously and/or currently used outside of [Redacted] will ever be used in [Redacted], the employee replied that the scaffolding in question is for a type of work not done in [Redacted] primarily larger jobs requiring bigger, more intricate scaffolding. Asked if the taxpayer paid tax on the use of the scaffolding in other states where the taxpayer used items on construction sites, the taxpayer's employee and representative suggested that much of it was used in [Redacted] where no tax was due.

ANALYSIS AND CONCLUSIONS

Idaho imposes a tax on the sale of tangible personal property, unless an exemption applies.

63-3619. Imposition and rate of the sales tax. -- An excise tax is hereby imposed upon each sale at retail at the rate of five per cent (5%) of the sales price of all retail sales subject to taxation under this chapter...*(Note: throughout, we make reference to the statutes in effect during the audit period. They reflect a 5% tax rate.)*

When the state legislature enacted the sales and use tax statutes in 1965, it recognized that not all sales could be reached by the sales tax. Thus, the House Revenue and Taxation Committee addressed the complementary use tax:

Section 15 (b). *The term "use" is here defined as broadly as possible and includes anything arising out of the legal status of ownership and the incidence of ownership other than sale of property in the regular course of business. By this definition, the use tax in its operation applies to any dealing with property on the part of the person holding or consuming it. It is this breadth of definition that makes the use tax concomitant of the sales tax covering those areas involving transactions in tangible personal property which are not reached by the sales tax. Report in Support of House Bill 222 (May 4, 1965)*

Thus, in the current case, the Commission holds the taxpayer's purchase of scaffolding, other equipment and supplies subject to a use tax, as these purchases would have been subject to a sales tax had they been purchased from and delivered to this state by an [Redacted]-registered vendor required to collect the tax. The Commission relies on the following statute, in pertinent part:

63-3621. Imposition and rate of the use tax -- Exemptions. -- An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property acquired on or after July 1, 1965, for storage, use, or other consumption in this state at the rate of five percent (5%) of the value of the property, and a recent sales price shall be presumptive evidence of the value of the property....

(a) Every person storing, using, or otherwise consuming, in this state, tangible personal property is liable for the tax. His liability is not extinguished until the tax has been paid to this state except that a receipt from a retailer maintaining a place of business in this state or engaged in business in this state given to the purchaser is sufficient to

relieve the purchaser from further liability for the tax to which the receipt refers...

(e) For the purpose of the proper administration of this act and to prevent evasion of the use tax and the duty to collect the use tax, it shall be presumed that tangible personal property sold by any person for delivery in this state is sold for storage, use, or other consumption in this state...

(h) It shall be presumed that tangible personal property shipped or brought to this state by the purchaser was purchased from a retailer, for storage, use or other consumption in this state.

The Commission emphasizes here that the possibility of an exemption in the context of the current case is limited to use tax, and not to sales tax. Thus, the taxpayer's representative's statement quoted earlier that, "...simply because equipment is delivered in the state of Idaho it does not mean that an Idaho Sales or Use Tax is due," is not correct with respect to sales tax. Idaho Code § 63-3621 cited above applies only to use tax, and no such provision exists for sales tax.

The taxpayer does not deny that it purchased scaffolding without paying tax, nor does it deny that the scaffolding has been present in the state. Rather, it denies that its "use" of the items in the state rises to the level defined in the tax code for the purpose of triggering tax. The relevant statute is excerpted below.

63-3615. Storage -- Use. -- (a) *The term "storage" includes any keeping or retention in this state for any purpose except sale in the regular course of business or subsequent use solely outside this state of tangible personal property purchased from a retailer.*

(b) The term "use" includes the exercise of any right or power over tangible personal property incident to the ownership or the leasing of that property...(Emphasis added).

In addition to admitting that it bought scaffolding and had it shipped or otherwise brought into the state, the taxpayer admits that it takes the scaffolding out of state for use in building construction; brings the scaffolding back to the state for periodic storage between out-of-state jobs;

and makes necessary repairs to the scaffolding while it is in the state. The taxpayer also states unequivocally that it will never use the scaffolding on construction sites in [Redacted].

In response, the Commission focuses on the phrase, “.... *subsequent use solely outside this state...*” (Idaho Code § 63-3615(a)), as well as on the code section that enumerates the exceptions to “use” that will not trigger tax.

63-3615. Storage -- Use. (c) "Storage" and "use" do not include the keeping, retaining, or exercising of any right or power over tangible personal property for the purpose of subsequently transporting it outside the state for use thereafter solely outside the state, or for the purpose of being processed, fabricated, or manufactured into, attached to, or incorporated into other tangible personal property to be transported outside the state, and thereafter used solely outside the state

The words “thereafter” and “solely” are not defined in the sales tax code; therefore, the Commission will rely on a generally understood meaning available in a dictionary. “Thereafter” is defined as, “after that.” “Solely,” within the context used, is “to the exclusion of all else.” (www.m-w.com).

The Commission interprets the preceding paragraphs from Idaho Code § 63-3615, in concert with the legislative intent of 1965 and generally understood meaning of words to imply that the untaxed purchase of tangible personal property not intended to be incorporated into realty in another state is subject to use tax in this state unless it is taken after storage in Idaho to a location or locations outside the state where it will be used. In short, the Commission does not believe that the legislature contemplated the periodic return of the items to the state to be excluded from the term “use.” We exercise latitude in our thinking because of the unambiguous legislative intent to define broadly the term “use.” Further, the Commission recognizes that exemption statutes are to be strictly construed against the party claiming the exemption. *Kwik Vend Inc. v. Koontz*, 94 Idaho 166, 483 P.2d 928 (1971); *Upper Columbia Mission Society v. Kootenai County*, 93 Idaho 880, 477 P.2d 503

(1970).

The taxpayer's statement that, "The Idaho State Tax Commission has not presented any evidence that equipment brought into the state of [Redacted] by [Redacted] was for storage, use or consumption in the state of Idaho," is not persuasive because Idaho Code §63-3621(h) places the burden of proof on the taxpayer: "It shall be presumed that tangible personal property shipped or brought to this state by the purchaser was purchased from a retailer, for storage, use or other consumption in this state."

The taxpayer relates that with considerable effort it could ascertain where all scaffolding has been since purchase and that it could do so through a time consuming and costly tracking of freight billings. The lack of readily available records suggests that the scaffolding and equipment is in an undifferentiated inventory of goods warehoused until its next available use. This is consistent with the observations of the auditor.

Use is entirely under the control of the taxpayer, and nothing in the accounting records or physical maintenance of the items suggests that there are prohibitions to in-state use. The Commission saw invoices indicating that the taxpayer had contracts in [Redacted] for the large construction projects it says are exclusive to its out-of-state business. Further, any transportation of the items to nearby in-state construction sites conceivably may not involve the hiring of freight services, rendering freight records an incomplete history of movement.

In Missouri, a state with a use tax statute and definition of "use" similar to that of Idaho, a comparable case was decided in favor of the Department of Revenue. In that case, a telecommunications company delivered property to a warehouse in state, kept it there for periods of time and then withdrew and delivered the property to construction sites outside of the state. A Missouri Court of Appeals said,

It cannot be said of any particular item of property at the time of its purchase that it was purchased for the purpose of subsequent use solely outside the state. One could only say of a particular item of property that it might be used outside the state, or it might be used within the state. Of the mass of property, it may only be said at the time of its purchase that some undetermined and undivided part of it would be later used outside the state. How much of the property, if any at all, would be withdrawn from the mass for use outside the state; which particular items of property; and when the withdrawal should be made, all were within Sprint's control. U.S. Sprint Communications Co. v. Director Of Revenue, 834 S.W.2d 803 (1992).

The taxpayer's employee provided spreadsheets showing job names, revenue figures, and sales tax paid on scaffolding over the audit period. She and the taxpayer's representative proposed that the Commission accept as payment in full the amount of sales tax paid to vendors over the audit period. They compared the percentage of total revenue attributable to [Redacted] (average of 54% per audit year) with the tax [Redacted] paid on scaffolding and concluded that the tax exceeds what one would "expect" for the amount of Idaho business. The Commission rejects this approach, as there is no statutory authority for an [Redacted] resident business to measure tax owed based on the geographic use of its assets in part or in the aggregate.

The auditor did not find evidence that the taxpayer paid a use tax to other states where, presumably, the taxpayer believed it had exercised sufficient use to incur a liability. In response to this inquiry at the informal hearing, the taxpayer responded that most use occurred in [Redacted] and [Redacted], where no tax is due. The Commission finds this at odds with the auditor's notes and earlier statements made by the taxpayer. The taxpayer mentioned construction sites in [Redacted], [Redacted], and [Redacted] in addition to [Redacted], [Redacted], and [Redacted]. As a point of clarification, the taxpayer is incorrect with respect to [Redacted] State. Its sales and use tax code is similar to Idaho's in that equipment used by a contractor is subject to a state sales or use tax (RCW

82.12.010(2)(c) Definitions; and RCW 82.12.020(1) and (3) Use tax imposed.)

The Commission reviewed spreadsheets and invoices provided by the taxpayer at the informal hearing and found no basis for making adjustments to the liability. Some of the adjustments asked for were already reflected in the final work papers on which the liability is based. Other requested adjustments were for goods shipped by common carrier from out-of-state vendor locations into [Redacted]. These invoices showed that the vendors incorrectly applied their state's tax to a sale that did not occur there. The Commission is obligated only to accept taxes that are correctly paid to other jurisdictions. "A credit may not be claimed for taxes erroneously paid to another state if no taxable sale or use under the laws of that state occurred." (Application and Payment of Use Tax, IDAPA 35.01.02.072.07)

The Bureau added interest and penalty to the sales and use tax deficiency. The Commission reviewed those additions and found both to be appropriate per §§ 63-3045 and 63-3046, Idaho Code. Interest on the Notice of Deficiency Determination has been updated to December 31, 2004.

WHEREFORE, the Notice of Deficiency Determination dated December 5, 2003, is hereby MODIFIED, and as so modified is APPROVED, AFFIRMED and MADE FINAL.

IT IS ORDERED and THIS DOES ORDER that the taxpayer pay the following tax, penalty and interest:

<u>TAX</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
\$ 66,450	\$ 3,323	\$ 20,183	\$89,956

DEMAND for immediate payment is hereby made and given.

An explanation of the taxpayer's right to appeal this decision is enclosed with this decision.

DATED this _____ day of _____, 2004.

IDAHO STATE TAX COMMISSION

COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of _____, 2004, a copy of the within and foregoing DECISION was served by sending the same by United States mail, postage prepaid, in an envelope addressed to:

[REDACTED]

Receipt